



Case Number:	Judicial Review Miscellaneous Application 137 of 2019
Date Delivered:	07 Feb 2020
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Radido Stephen Okiyo
Citation:	Gerald Muli Kiilu v Cabinet Secretary, Ministry of Labour and Social Protection & another; Barclays Bank of Kenya(Interested Party) [2020] eKLR
Advocates:	For applicant Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates Advocates For Interested Party Ms. Wanjiru instructed by Mohammed Muigai LLP
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Grant declined
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW MISC APPLICATION NO. 137 OF 2019**

**IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: RULE 7 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURTS ACT, 2011**

**AND**

**IN THE MATTER OF: SECTION 33 OF THE TRADE DISPUTES ACT, CHAPTER 234 LAWS OF KENYA (REPEALED)**

**AND**

**IN THE MATTER OF: ARTICLE 47(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

**BETWEEN**

**GERALD MULI KIILU .....APPLICANT**

**V**

**CABINET SECRETARY, MINISTRY OF LABOUR AND SOCIAL**

**PROTECTION .....1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**BARCLAYS BANK OF KENYA.....INTERESTED PARTY**

**RULING**

1. Gerald Muli Kiilu (applicant) was an employee of Barclays Bank of Kenya Ltd (Interested Party) until his employment was terminated on or around 31 January 2005.
2. The Banking, Insurance and Finance Union of Kenya (the Union) of which the applicant was a member reported a trade dispute to the Minister for Labour, but the dispute was not resolved as a result of which the Conciliator issued a *certificate of unresolved dispute* on 16 December 2009.
3. On 15 February 2010, the applicant instituted legal proceedings (Nairobi Industrial Cause No. 124 of 2010, *Gerald Muli Kiilu v Barclays Bank of Kenya*) against the Interested Party alleging wrongful termination of employment. The applicant anchored his dispute on the Employment Act, 2007.
4. The Interested Party raised a *Preliminary Objection* to the Cause on the ground of limitation in terms of section 90 of the Employment Act, 2007 and section 4(4) of the Trade Disputes Act (repealed), and in a Ruling delivered on 29 October 2010, the Industrial Court upheld the objection and dismissed the Cause.
5. The applicant appealed, and the Court of Appeal in a judgment delivered on 22 April 2016 (*Gerald Muli Kiilu v Barclays Bank of Kenya* (2016) eKLR upheld the decision of the Industrial Court (while upholding the decision, the Court of Appeal noted that the applicant had not obtained a Certificate from the Commissioner for Labour indicating that all available machinery under the Trade Disputes Act (repealed) had been exhausted).
6. On 30 May 2016, the Union requested the Cabinet Secretary, Labour (1<sup>st</sup> Respondent) to issue an Investigation Report in terms of the Trade Disputes Act (repealed) to enable it to decide on the next course of action.
7. Through a letter dated 16 December 2016, the 1<sup>st</sup> Respondent issued what it referenced *Certificate of Unresolved Trade Dispute* and cited section 69(a) of the Labour Relations Act.
8. On 2 May 2017, the Union made a report of a trade dispute to the Cabinet Secretary, Labour and the Issue in Dispute was stated as Wrongful dismissal from employment of Gerald Muli Kiilu.
9. The Union indicated that it was making the report on the strength of sections 5(1) and 6(2) of the Trade Disputes Act (repealed).
10. The 1<sup>st</sup> Respondent, through a letter dated 12 July 2017 notified the Union that it had accepted the reported trade dispute and that a Conciliator had been appointed.
11. The Conciliator issued a report on 4 September 2017 in which he recommended that the applicant be reinstated without loss of any benefits and also be paid compensation equivalent to 10 months' salary for wrongful termination of employment.
12. On 6 November 2017, the Union applied to the 1<sup>st</sup> Respondent to execute and issue FORM A and FORM D referring the dispute to the Court.
13. The 1<sup>st</sup> Respondent did not respond and the applicant sought legal assistance. On 8 May 2019, his advocates made a formal demand to the 1<sup>st</sup> Respondent giving a 7-day ultimatum to the Respondent to carry out his statutory function.
14. The ultimatum was followed by the instant application by which the applicant seeks

1. ...

2. THAT the Court be pleased to grant leave to the applicant to apply for the judicial review order of mandamus to compel the Respondent to duly execute FORM D and refer the dispute to the Employment and Labour Relations Court for the dispute to be adjudicated upon;

3. ...

15. When the leave application was presented before the Duty Court, the Court directed that it be served for *inter partes* hearing.

16. The *inter partes* hearing did not proceed on 22 October 2019 because the applicant sought for leave to file a further affidavit (the further affidavit was not filed).

17. Upon service, the Interested Party filed a Notice of Preliminary Objection contending that

1. The purported dispute between the Applicant and the Interested Party is time-barred under the provisions of section 90 of the Employment Act, 2007, the Trade Disputes Act Cap 234 Laws of Kenya (now repealed) as read with section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya; and

2. The issues raised have been finally determined by the Court of Appeal in Civil Appeal No. 10 of 2011, *Gerald Muli Kiilu v Barclays Bank of Kenya*.

18. The Court took brief oral submissions from the parties on 14 November 2019.

19. The Court has considered the material placed before it including the oral submissions.

20. Both the Industrial Court and the Court of Appeal recognised that the applicant had approached the Court and anchored his cause on statutes which did not apply to the dispute, and also failed to comply with certain requirements.

21. The Court of Appeal also observed that the applicant had thus followed the said procedure set out in the Trade Disputes Act which Act also allowed the Minister to accept the notification of disputes outside the limited time of 28 days. Although the appellant followed the said procedure we do not see on record compliance of the requirement that the appellant obtain a certificate from the Commissioner of Labour expressing the Minister's acceptance that all available machinery for settlement of the dispute prior to the reference to the Industrial Court had been exhausted...

22. Despite the Court of Appeal observing that the applicant did not get a compliance certificate, there is now before this Court material to suggest that the go-ahead of the 1<sup>st</sup> Respondent was given through the letter dated 16 December 2009.

23. It is noteworthy that under section 2(4)(b) of the Fifth Schedule to the Labour Relations Act, the trade dispute relating to the termination of applicant's employment had not been referred to the Industrial Court prior to the coming into effect of the Labour Relations Act, and therefore the Certificate under section 69(a) of the Act appear to have been proper.

24. Having reviewed all the material now placed before this Court, it appears that the applicant's legal advisers/representatives did not advise him correctly, hence the legal imbroglio which necessitated going up to the Court of Appeal.

25. In the circumstances, should the Court entertain or allow the instant application to reopen the dispute between the applicant and the Respondent"

26. In *National Bank Of Kenya Ltd v E. Muriu Kamau & another* (2009) eKLR, it was stated that

An advocate is usually liable for negligence where before bringing the action he fails to make proper investigations into the cause of action, preparing wrong or defective pleadings or failure to check documents in order to establish whether they conform with the law, practice and procedure commonly used within the corridors of the High Court and Court of Appeal. Where an advocate

advises a party to commence proceedings for a particular sum and where he advises the client to enter into litigation even though success is improbable, where he proceeds under wrong statutes or where he fails to remedy the situation in time to prevent limitation, where there is inexcusable delay in the prosecution of the claim or where he fails to inform his client the details and progress achieved in his case or where he fails to prepare the case properly for trial or where he advises a hopeless appeal which could not benefit the client, or where he fails to register a pending action, the implication of the law stipulates negligence on the part of the advocate.

27. It is therefore clear that the applicant is where he is because of lack of care and diligence on the part of his legal advisers. He now wants to get a second bite at the cherry through judicial review proceedings by instigating a fresh round of litigation.

28. The Court should not allow that as litigation must come to an end, whether incorrect advice was given or whether a case was found without merit.

29. Further, in the view of the Court, it cannot be said that the 1<sup>st</sup> Respondent had refused to perform a statutory obligation when he had already performed that obligation by issuing the relevant instrument on 16 December 2009.

30. On the question of limitation, the Court notes that the Court of Appeal observed that the dispute advanced by the applicant was subject to the Limitation of Actions Act, and consequently there may be merit in the contention by the Interested Party that any likely cause of action would be time-barred.

31. In the circumstances, the Court declines to grant leave to commence judicial review proceedings. No order on costs.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of February 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates Advocates

Respondents did not formally come on record

For Interested Party Ms. Wanjiru instructed by Mohammed Muigai LLP

Court Assistant Judy Maina



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